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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989
No. 89-877

LEDURA WATKINS,

Petitioner,

vs.

DALE FOLTZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 88-1739

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. - II.

WAS THE DISTRICT COURT REQUIRED TO NOTIFY THE PETITIONER OF FURTHER POSSIBLE APPELLATE REMEDIES UPON ITS DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS AND WAS THE DISTRICT COURT REQUIRED TO GRANT THE PETITIONER'S MOTION FOR AN ORDER "RECALLING THE JUDGMENT" IN ORDER TO ENABLE HIM TO PURSUE AN APPEAL DESPITE HIS NINETEEN-MONTH DELAY IN SEEKING AN APPEAL AFTER THE COURT'S DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS?

The Petitioner answers:	"Yes."
The Respondent answers:	"No."
The District Court answered:	"No."
The Sixth Circuit Court of Appeals answered:	"No."

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STATEMENT OF THE CASE

On March 16, 1976, the Petitioner was convicted by a jury of first-degree murder (Detroit Recorder's Court No. 75-08084). On April 15, 1976, a mandatory sentence of life imprisonment was imposed. The Petitioner's conviction was affirmed by the Michigan Court of Appeals on September 7, 1977. People v Watkins, 78 Mich.App. 89; 259 N.W.2d 381 (1977). On May 4, 1979 the Michigan Supreme Court denied the Petitioner's delayed application for leave to appeal. People v Watkins, 406 Mich. 954 (1979).

A second delayed motion for new trial was denied on March 3, 1982. On July 13, 1982, the Michigan Court of Appeals granted the Petitioner's application for delayed appeal. By unpublished per curiam opinion (No. 63404) dated May 24, 1983, the Court

of Appeals again affirmed the Petitioner's conviction. His application for leave to appeal to the Michigan Supreme Court was denied by order dated December 29, 1983. People v Watkins, 418 Mich. 897 (1983).

On or about April 22, 1986, the Petitioner filed a pro se application for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, Southern Division (Civil Action No. 86CV-40192-FL). By "Memorandum Opinion and Order" and "Judgment" dated November 21, 1986, the Honorable Stewart A. Newblatt denied the petition for a writ of habeas corpus.

Nineteen months later on June 20, 1988, the Petitioner, through retained counsel, filed a "Petition under the All Writs Act (28 U.S.C. 1651) for Order Recalling Judgment to Allow Taking of an Appeal". This motion was denied by Judge Newblatt by order

dated June 28, 1988 wherein the following was noted:

> "... He seeks this because he did not timely appeal from the earlier judgment.
> "There is no authority for such an action, and there is no basis to grant the request.*
>
> ---
>
> "* The only basis asserted was that defendant-petitioner, not being an attorney and not knowing of his appellate rights, failed to timely appeal. This is not sufficient."

On January 30, 1989, the District Court issued a certificate of probable cause from its June 30, 1988 order denying the Petitioner's motion to recall judgment.

On July 27, 1989, the United States Court of Appeals for the Sixth Circuit upheld the decision of the District Court, noting the following at page 2 of its Order:

> "Watkins failed to assert any basis for relief under (Sec.) 1651 and to the extent that the action is construed as a petition for a writ of mandamus, relief is not warranted because Watkins failed to make the required

> demonstration that he has a clear and indisputable right to relief. See In Re Post-Newsweek Stations, Mich., Inc., 722 F.2d 325, 329 (6th Cir. 1983)."

By Order dated October 4, 1989, the Court of Appeals denied the Petitioner's motion for rehearing.

REASONS FOR DENYING THE WRIT

NEITHER WAS THE DISTRICT COURT REQUIRED TO NOTIFY THE PETITIONER OF FURTHER POSSIBLE APPELLATE REMEDIES UPON ITS DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS NOR WAS IT REQUIRED TO GRANT THE PETITIONER'S MOTION FOR AN ORDER "RECALLING THE JUDGMENT" IN ORDER TO ENABLE HIM TO PURSUE AN APPEAL ESPECIALLY IN LIGHT OF A NINETEEN-MONTH DELAY IN SEEKING AN APPEAL AFTER THE COURT'S DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS.

The District Court issued a certificate of probable cause from its June 30, 1988 order denying the Petitioner's motion to recall the judgment. While noting the questionable basis for the issuance of the certificate under

Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), this Court summarized the lengthy delay by the Petitioner in seeking appellate review of its order denying the request for a writ of habeas corpus:

> "The order of June 28, 1988, denying recall of the judgment of November 21, 1986 was entered on petitioner's motion seeking the recall filed June 22, 1988. Thus, the motion was filed 19 months after the judgment, 18 months after the appeal time expired and 17 months after the 30-day extension period expired."

Implicit in the Petition filed by the Petitioner is a tacit admission that this one and one-half year delay was not due to any failure by the District Court in serving him a copy of the original opinion and judgment in a timely fashion. But, despite any rule requiring the court to inform him of his "right" to appeal therefrom, he now claims that such a rule should exist since he is not an attorney and

could not be expected to know his appellate rights.

While he claims ignorance of appellate procedure and remedies, one cannot overlook the fact that he was clearly aware of such matters when he repeatedly sought and obtained appellate relief within the state system. Furthermore, in pleadings filed in the United States Court of Appeals for the Sixth Circuit, he readily admitted that he received the assistance of a "paralegal in the prison" when he prepared his petition for a writ of habeas corpus which he filed in the District Court (Petitioner's Brief on Appeal, p. 2). In light of such facts, it defies logic to believe that the Petitioner was totally unaware of the possibility of an appeal from the 1986 denial of his petition. It is far more reasonable to believe that, like many state prisoners, he simply decided not to

seek review of this denial and that he had no second thoughts about this decision at that time.

Whether represented by counsel or proceeding in pro se, the failure to comply with the filing requirements to perfect an appeal in a timely matter are jurisdictional and must result in dismissal of belatedly-filed appeals. See Mann v. Lynaugh, 840 F.2d 1194 (5th Cir. 1988); Matarese v. LeFerre, 801 F.2d 98 (2nd Cir. 1986), cert. den. 480 U.S. 908, 107 S.Ct. 1353, 94 L.Ed.2d 523 (1987); United States ex rel. Leonard v. O'Leary, 788 F.2d 1238 (7th Cir. 1986); Williams v. Armontrout, 777 F.2d 422 (8th Cir. 1985). An extension of time cannot be granted by the courts of appeal. Felix v. Cardwell, 545 F.2d 92 (9th Cir. 1976), cert. den. 430 U.S. 910, 97 S.Ct. 1183, 51 L.Ed.2d 587 (1977). Courts have had very little difficulty in dismissing such appeals whether the delay is merely two or

three days [Birl v. Estelle, 660 F.2d 592 (5th Cir. 1981)] or thirteen months [Jones v. Estelle, 693 F.2d 547 (5th Cir. 1982), cert. den. 460 U.S. 1072, 103 S.Ct. 1528, 75 L.Ed.2d 950 (1983)].

A failure to receive the judgment may excuse a late filing. In Givens v. Housewright, 612 F.Supp. 174 (D.C. Nev. 1985), rev'd on other grounds 786 F.2d 1378 (9th Cir. 1986), a petitioner was permitted an extension of time to file a notice of appeal due to the 13-day delay between the issuance of the dismissal of the petition for a writ of habeas corpus and the clerk's entry of the judgment to the time the petitioner received it. However, as noted above, the Petitioner herein cannot make such a claim to excuse the nineteen-month delay in this case.

The mere failure to file a timely notice of appeal is not a "unique

circumstance" which will later permit a finding of excusable neglect for a late filing. Mann v. Lynaugh, 840 F.2d at 1200. A pro se petitioner's ignorance of appellate procedures is likewise insufficient to establish excusable neglect or good cause to permit a late filing. In Matarese v. LeFevre, supra, the court noted the following circumstances (801 F.2d at 107):

> "In order to show that extraordinary circumstances warranting Rule 60(b)(6) relief existed in his case, Matarese filed an affidavit stating ... (2) that he had not filed a notice of appeal from the 1981 Judgment principally because he had been proceeding pro se, had been ignorant of his right to appeal or to seek a certificate of probable cause, was uneducated, had difficulty reading at a fifth grade level, and no one at the prison at which he was then incarcerated would give him any advice as to his legal rights. He stated that only after being transferred to another prison did he learn of his right to seek a certificate of probable cause.
>
> "These statements were inadequate to show the extraordinary circumstances needed to justify vacation of a judgment pursuant to Rule 60(b)(6). ... And

> Matarese's ignorance of post-judgment procedures provided no logical basis for the district court's reconsideration of the decision that preceded the judgment." (emphasis added)

Similar observations were made by the court in Birl v. Estelle, supra (660 F.2d at 593):

> "The record reflects that Birl received a copy of the judgment entered March 7, 1980 in ample time to comply with the 30-day filing requirement. The record also reflects that Birl is an individual of at least ordinary intelligence who has access to a prison law library. He is not a stranger to the courthouse or to habeas corpus proceedings. Therefore, viewing the facts and circumstances as a whole (citation omitted), we are unable to say that this is an extraordinary case where denying an extension would constitute an injustice. Budgan v. Missouri Neon & Plastic Advertising Co., 472 F.2d 944, 948 (8th Cir. 1973). ... Merely proceeding pro se does not confer an extension of the ordinary jurisdictional requirement of timely filing. See Holley v. Capps, 475 F.2d 232 (5th Cir. 1973).

The failure to comply with the jurisdictional requirement of timely filing has also been strictly enforced in this Circuit, even in pro se cases.

Despite a mere two-day delay in filing a notice of appeal in Pryor v. Marshall, 711 F.2d 63 (6th Cir. 1983), this Court held that the failure to file a timely motion for extension of time under the provisions of Fed.R.App.P. 4(a)(5) required dismissal of the petitioner's appeal for lack of jurisdiction and barred review of the merits of the appeal. While noting that a district court has "...no duty to search the record to ascertain whether notice is untimely ..." (Pryor v. Marshall, 711 F.2d at 65, fn 4)(emphasis in original), the court "suggested" that in future cases it may be "most helpful" to inform pro se litigants that their notice of appeal is untimely so as to alert them that additional steps are required to secure appellate jurisdiction. This, of course, assumes that a would-be appellant has taken at least one step toward notifying the court of his

intention to seek further review. This suggestion simply does not apply to one who does absolutely nothing for over one and one-half years! In the instant case, the Petitioner claims to cling to the belief that the issue which he presented to the District Court below had merit then and has merit now. If this is so, it is inconceivable that he would have done nothing despite the help which he received from a "prison paralegal" in preparing his original petition and after having twice utilized the state appellate system to seek reversal of his conviction.